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Supreme Court of the United States

October Term, 1966

No. 352

BETTY LEVIN, a holder of Missouri Pacific Railroad Company Class B common stock,

Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 15, 1966

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No.

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Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Betty Levin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit reversing an order of the United States District Court for the Eastern District of Missouri.

Opinions Below

The opinion of the District Court is reported at 233 F. Supp. 747 (E.D. Mo. 1964), and is reprinted as Appendix A hereto and at R. 90-98. The opinion of the Court of Appeals is not yet reported, and is printed as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

This case involves the proper construction of basic sections of the Interstate Commerce Act—Sections 5(2) and 5(11)—relating to the jurisdictional scope of the Act over mergers and consolidations of interstate carriers, and the extent to which State corporate law is to be followed in effectuating such mergers and consolidations. The pertinent provisions of those statutes, and of the Rules of the Interstate Commerce Commission, the Missouri statutes, and the Charter of Missouri Pacific Railroad, are set forth in Appendix C hereto.

Questions Presented

1. Was it proper for the Court of Appeals, in conflict with the decision of this Court in *County of Marin* v. *United States*, 356 U. S. 412, to permit the controlling stockholder of a railroad to invoke the Interstate Commerce Act by presenting a sham proposal to consolidate the railroad with one of its subsidiaries, when the real purpose of the proposal was (a) to destroy the valuable rights and equity of a class of stock possessing a minority of the voting power, (b) to destroy the protective class voting rights of the minority class granted by a plan of reorganization agreed upon by the parties, embodied in the railroad's charter, and approved by the courts pursuant to Section 77 of the Bankruptcy Act, and (c) to enrich the controlling stockholder at the expense of the minority class?

2. Was it proper for the Court of Appeals, charged by the mandate of Section 5(11) of the Interstate Commerce Act to determine the stockholder "vote . . . required under applicable State law" to effect a consolidation (*arguendo* within the scope of the Act), to decline to make such determination, and instead to construe Section 5(11) as if there were no applicable State law?

3. Have the ICC and the courts heretofore erred in consistently construing Section 5(11) as requiring adher-

ence to charter provisions governing stockholder voting for mergers and consolidations; and should the ICC hereafter ignore such charter provisions, and if so, how should it then determine the vote required by Section 5(11)?

4. Did the Court of Appeals properly construe and apply congressional national transportation policy as permitting transactions to qualify under the Interstate Commerce Act on the basis of their form alone, regardless of their purpose and substance?

5. Was it proper for the Court of Appeals to repudiate the time-honored principle of judicial estoppel enunciated by this Court in *Davis* v. *Wakelee*, 156 U. S. 680, by permitting the respondents, who successfully maintained in an earlier proceeding before the ICC that class voting is required for mergers and consolidations, to reverse their position and maintain the contrary in this case, "simply because [their] interests have changed"?

Statement of the Case

This case involves the attempt by Mississippi River Fuel Corporation, the controlling stockholder of Missouri Pacific Railroad, to seize for itself the legal rights and property in excess of $240,000,000 belonging to the minority (Class B) stockholders of the railroad. Mississippi seeks to accomplish this result by a scheme labelled "plan of consolidation", but whose substance and real purpose are to deprive the minority stockholders of separate class voting rights and property granted to them in 1955 by a plan of bankruptcy reorganization duly approved by the parties, the ICC, and the courts.

In actions seeking to bar Mississippi from proceeding with such scheme, the District Court concluded that (a) the charter mandated by the bankruptcy reorganization had clearly given the minority stockholders the right to class voting on any change of class rights; (b) the transaction proposed by Mississippi "plainly and obviously" would change class rights and eliminate the class voting pro-

visions of the charter, and therefore would require a class vote under the charter; (c) under Missouri law, the voting requirements for consolidations are controlled by the charter provisions for class voting; and therefore (d) under § 5(11) of the Interstate Commerce Act, such class vote is the "vote. . . . required under applicable State law".

The Court of Appeals reversed the District Court, holding that, since the scheme was in form a plan of consolidation, its substance and real purpose were not germane, and therefore the plan was within the scope of the Interstate Commerce Act. Further, although perplexed by doubts and uncertainties on this issue, the Court of Appeals nevertheless held that the minority stockholders could not exercise their class voting rights in voting on the scheme.

By the decision of the Court of Appeals, rights established in a railroad reorganization under § 77 of the Bankruptcy Act are destroyed by a transparent ruse concocted by a majority stockholder in abuse of the Interstate Commerce Act. To reach that result, the court:

(a) controverted the holding of this Court in *County of Marin, supra;* concerning the basic jurisdictional scope of the Interstate Commerce Act,

(b) upset a consistent and clear line of decisions of the ICC sanctioned by the courts, and instead left the ICC with no clear guidelines as to the proper application of § 5(11) of the Interstate Commerce Act,

(c) misconstrued congressional national transportation policy underlying § 5 of the Interstate Commerce Act, and controverted the ICC's interpretation and application of such policy,

(d) contradicted itself by first recognizing applicable State law and then disregarding it,

(e) abandoned its own rule of respect for a district judge's conclusions as to the law of his state, and

(f) repudiated the principle of judicial estoppel set forth by this Court in *Davis* v. *Wakelee, supra.*

A. The Reorganization

Missouri Pacific Railroad Company ("MoPac") was in bankruptcy reorganization proceedings for 23 years. Three forfeiture plans, wiping out all or most of the preferred stock claims and all of the common stock, were proposed by the ICC but were scrapped as actual earnings outstripped the official estimates.[1]

By 1954, MoPac's earnings had increased so much that all the old securities were inescapably entitled to recognition. The parties then negotiated an "Agreed System Plan", which was approved by the ICC and the courts and adopted as the Fourth Plan of Reorganization effective as of January 1, 1955.[2]

The old preferred stockholders received new non-participating preferred stock, the Class A. Such Class A stock is preferentially entitled to non-cumulative dividends limited to a maximum of $5 per share per year, and to assets of $100 per share on liquidation.

The old common stockholders received all the new common stock, Class B, which entitled them to all the residual earnings and assets. It was a purpose of the Fourth Plan of Reorganization to relate the value of the Class B stock to the future success of MoPac.

About 1,850,000 Class A shares were issued, but only 40,000 Class B shares. Since each share of each class was

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[1] *Chemical Bank & Trust Co.* v. *Group of Institutional Investors*, 343 U. S. 982, 983-87 (1952).

[2] *Missouri Pac. R. Co. Reorganization*, 290 I.C.C. 477 (1954); *In re Missouri Pac. R. Co.*, 129 F. Supp. 392 (E. D. Mo. 1955), aff'd *sub nom. Missouri Pac. R. Co. 5¼% S.S.B.C.* v. *Thompson*, 225 F. 2d 761 (8 Cir. 1955), cert. denied 350 U. S. 959; *In re Missouri Pac. R. Co.*, 135 F. Supp. 102 (E. D. Mo. 1955), aff'd *sub nom. Missouri Pac. R. Co. 5¼% S.S.B.C.* v. *Thompson*, 229 F. 2d 898 (8 Cir. 1956).

given one vote, 98% of the voting power was thus lodged with the Class A.[3]

Events have justified the common stockholders' long struggle against forfeiture. At the time of the Fourth Plan, their portion of the total shareholders' equity was only $4,000,000. As a result of the steady growth of MoPac's earnings, the equity of the Class B stock is now more than $250,000,000—$6,300 per share of Class B stock.[4]

Earnings on the Class B now exceed $17,000,000 a year—$430 per share of Class B stock.[5]

B. Class Voting Rights

To protect the Class B's rights and values against the preponderant voting power of the Class A, the Fourth Plan of Reorganization required that the charter be

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[3] Control was shifted to the preferred stockholders as protection for their dividends which, on the new Class A stock, were made non-cumulative. There had been about 700,000 shares of old cumulative preferred and 800,000 shares of old common stock. The Fourth Plan of Reorganization allotted about $189,000,000 to the old stockholders. This enabled the old preferreds to be paid in full: For their $70,000,000 of old preferred stock and $115,000,000 of accumulated dividends, they received $185,000,000 of new preferred stock—that is, 1,850,000 shares of Class A. The remaining $4,000,000 went to the old common stockholders as new common stock—40,000 shares of Class B, on the basis of one share of Class B for every 20 shares of old common stock. Table of distribution of securities, 129 F. Supp. at 403; 290 ICC at 597, 600.

[4] March 31, 1966, MoPac consolidated balance sheet filed with the ICC reports total shareholders' equity of $435,790,846. The Class A equity remains fixed and limited at $185,000,000 ($100 per share); the residue and all increases in total shareholders' equity accrue entirely to the Class B.

[5] MoPac annual report for 1965 reports consolidated net income of $26,301,000. After full dividends of $9,238,000 on the Class A stock (at the maximum rate of $5 per share), the residue of $17,000,000 accrues entirely to the Class B stock.

amended to provide for class voting on any change of class rights. Such a charter provision

> "is characterized by Missouri Pacific as a 'standard protective provision afforded owners of minority stock interests' through which such interests might have an effective voice in matters pertaining to the intrinsic investment value of their stocks, such as, mergers, consolidations and plans for the alteration or modification of the stock."[6]

The sweeping protective language of the class voting provision in the MoPac charter was originally stipulated by the parties who negotiated the Agreed System Plan. Their stipulation was adopted by the ICC as part of the Fourth Plan. The class voting provision was set forth three times in the Submission to the parties entitled to vote for acceptance or rejection of the Fourth Plan. Holders of 95.01% of the old preferred stock and 99.6% of the old common stock voting thereon voted to accept it.[7]

In the final drafting of the actual amendment to the charter, the language was further broadened to parallel the language of the Missouri statute.[8] As so drafted, Article VII D(3) of the charter provides as follows:

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[6] *Missouri Pac. R. Co.-Control-Chicago & Eastern Ill. R. Co.*, — ICC — (1965), Finance Docket No. 21755, p. 51.

[7] Agreement dated May 6, 1954, p. 2, annexed to Trustee's Petition dated May 10, 1954, filed with ICC May 12, 1954 (also printed as Trustee's Ex. 3 in Vol. I-A of Record in 225 F. 2d 761 (8 Cir. 1955)); 290 ICC at 598 and 665; Submission of Plan of Reorganization (21), (118), (204) (also in Vol. V of said Record); ICC Certificate, Table No. 2, in certification of plan.

[8] "The articles of incorporation shall set forth . . . the preferences, qualifications, limitations, restrictions, and the special or relative rights of . . . the shares of each class. . . ." R. S. Mo. § 351.055.

> "**The Company shall not, without the consent,** given in writing or by resolution adopted at a meeting duly called for that purpose, **of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding,** (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, **(c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).**" (Emphasis supplied.)

The District Court then found the amendments to be necessary and proper to the Fourth Plan, and the certificate of amendments was accordingly filed with and accepted by the Secretary of State of Missouri.

The genesis of the separate class voting provision in the charter was not casual. The parties and the ICC were concerned with the need for special safeguards in view of the Fourth Plan's unique feature of lodging 98% of the voting power in the Class A stock but all of the residual earnings and equity in the Class B stock. The parties and the ICC recognized that an effective counter-balance to the voting power of the Class A stock was imperative to preserve the equilibrium and respective rights established by the Fourth Plan for the two classes of stock.

The class voting requirement for any change of class rights was therefore provided as the appropriate counterbalance to assure the necessary and desirable measure of stability for both classes of stock.

C. Merger With Texas and Pacific

In 1957 and 1958, MoPac seriously considered the possibility of merging with its subsidiary The Texas and Pacific Railway Company ("T & P").

After long and careful study, the MoPac directors—many of whom are still on the board[9]—unanimously rejected the merger as economically undesirable, because (among other reasons) both railroads were already operating jointly at all common points, the merger would have been end-to-end, and it would not have produced the economies realized in a merger of parallel lines (R. 9, 55).

D. The Transaction In Issue

Mississippi River Fuel Corporation ("Mississippi") first began to acquire MoPac Class A stock in 1959. (Prior thereto, Mississippi had no stock interest of any kind in MoPac.)

Ever since 1962, Mississippi has held over 1,000,000 shares of Class A stock of MoPac, constituting 58% of the Class A stock and 57% of the combined number of Class A and Class B shares. Mississippi has no Class B stock of MoPac.

Having acquired MoPac Class A stock wielding 57% of the voting power, Mississippi alone nominated, elected, and dominated the entire board of directors of MoPac. But one sentinel protected the Class B stockholders: the charter of MoPac.

As MoPac's earnings continued to rise ever higher, the limitations and restrictions on the Class A stock became obnoxious to Mississippi. Even with the payment of the full maximum annual dividends on the Class A stock, the great bulk of earnings—all the residual earnings—accrued to and enhanced continuously the equity of the Class B stock. Yet all the while, the equity of the Class A stock remained fixed and static.[10]

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[9] Defendants Marbury, Craft, Davis, Johnson, Bates, and Gussman (R. 55).

[10] In 1955, the Class A had 98% of the total shareholders' equity, and the Class B had 2%. Today, with the total equity having more than doubled, the Class A's proportion has dropped to 42%, while the Class B's is 58% of the total.

Mississippi was glad to accept the control given to the Class A stock under the Fourth Plan of Reorganization, but was no longer content with the fact that the Fourth Plan had also made the Class A stock a non-participating, non-cumulative, limited, preferred stock, with the Class B the true common stock of MoPac.

Obviously, Mississippi could not expect the ICC to rewrite the Fourth Plan of Reorganization for Mississippi's benefit. Mississippi therefore strove to attain the equivalent result by indirect means.

Unhampered by independent directors or the necessity of bargaining with anyone, Mississippi concocted a scheme which it dressed up as a plan of consolidation of MoPac with its subsidiary T & P—both railroads under the complete control and domination of Mississippi. That a consolidation of MoPac and T & P had been seriously studied and unanimously rejected as economically unsound but a few years earlier, and operating conditions had not materially changed in the interim, was no deterrent to Mississippi.

Consolidation was not Mississippi's objective. Other goals, none of them required for a consolidation, were plainly the moving consideration. They were:

(1) Elimination of the restrictions on the Class A stock;

(2) Elimination of the special prerogatives of the Class B stock; and

(3) Seizure by Mississippi of most of the valuable equity of the Class B stock.

The scheme was designed as follows to achieve Mississippi's goals:

In December 1963, MoPac announced that its board of directors had approved a plan to replace all the MoPac stock of both classes with a single class of common stock

of a new shell corporation created for the purpose, and to merge or consolidate MoPac and its subsidary T & P into the new shell.

The plan would treat identically each share of both classes: Each share of Class A and each share of Class B would be surrendered for four shares of the new common stock. Consequently, the Class B stockholders, who now own 100% of the residual earnings and equity, would end up with only 2% of the total—a net loss to the Class B of about $242,000,000 in present equity (which came from past earnings), and a net loss of $16,500,000 in current annual earnings on the Class B.

Most of the Class B's loss would be Mississippi's gain as majority Class A stockholder. The Class A would also be relieved of all present limitations on its participation in earnings and equity.[11]

As noted above, the equity of each Class A share is limited to $100, whereas the present equity of each Class B share is $6,300. That is to say, the equity of each Class B share is at present 63 times as great as that of each Class A share—and the gap is steadily widening. Yet under Mississippi's scheme, each Class B share would receive no more than each Class A share.

In terms of current earnings, say for 1965, the Class A was limited, as always, to $5 per share, whereas the residual earnings on the Class B were $430 per share. Although earnings per share are thus 86 times as great on the Class B as on the Class A, under Mississippi's scheme each share of Class B would become entitled (through the new stock) to no more earnings than each share of Class A.

In its application to the ICC, MoPac asked for the ICC's approval as required for consolidations under § 5(2) and as

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[11] Under the plan, the common stock of the new corporation would be issued in the following proportions: 94% to the MoPac Class A stockholders; 2% to the MoPac Class B stockholders; 4% to the T & P public (minority) stockholders. Supp. R. 2-3; R. 54, Application filed with ICC, pp. 22-23, 25, 35, and Exh. 14, p. 2.

required for the issuance of new stock under § 20a of the Interstate Commerce Act, 49 U.S.C. §§ 5(2) and 20a.

MoPac also stated in its application that the proposed plan was subject to stockholder approval by an aggregate vote. MoPac announced that the plan would be submitted at a special meeting for stockholder approval by a combined vote of both classes of stock, not by a separate class vote.

E. The Proceedings Below

This petitioner and other Class B stockholders brought diversity actions in the federal District Court to enjoin the plan as a fraud for the enrichment primarily of Mississippi, the controlling fiduciary Class A stockholder, at the expense of the Class B stockholders. The plaintiffs also sought a declaratory judgment that the plan could not be adopted without the separate consent of a majority of the Class B stock. (The actions were consolidated for limited purposes below. The parties are named and described at pp. 6a-7a, *infra*, and R. 44-47.)

The defendants moved to dismiss the complaints on the grounds that the ICC has exclusive jurisdiction over the plan, and that no separate Class B consent is required for stockholder approval of the plan.

The District Court, considering only the class voting issue,[12] said that the scheme "seems so plainly and obviously to alter and change the . . . restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion" (p. 9a, *infra*), and held that § 5(11) of the Interstate Commerce Act required separate class voting as stipulated in the MoPac charter.

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[12] More than 50% of the Class B stock is owned by the plaintiffs opposing the plan. Therefore, if the separate consent of a majority of each class was found to be required, the other issues (or most of them) would be mooted, and proceedings before the ICC would obviously be futile. See *Southwestern S. & M. Co.* v. *River Terminals Corp.*, 360 U. S. 411, 415 (1959).

The case was certified and defendants' appeal to the Court of Appeals was allowed under 28 U.S.C. § 1292(b). The appeal was argued on May 6, 1965.

On April 19, 1966, the Court of Appeals reversed. Its opinion is riddled with unresolved doubts and ambiguities.[13]

The Court of Appeals recognized that the Class B would be "engulfed" by the Class A under the proposed scheme (p. 15a, *infra*). Yet in an attempt to sugar-coat the forfeiture of the right to a class vote, the judges said that they "take comfort in the fact that, if [they] err" in scuttling the class vote, the plan is still subject to ICC approval under § 5(2) (p. 35a, *infra*). So to resolve all professed doubts in favor of the parties moving to dismiss complaints on the merits is to turn on its head the opposite principle observed in the federal courts—including the court below prior to this case.[14]

Notwithstanding the judges' "comfort" at the excision, one eye is not the same as two. *Both* the approval of the ICC under §5(2) *and* the approval of the stockholders in accordance with their voting rights under § 5(11) are indispensable prerequisites to mergers and consolidations. *Schwabacher* v. *United States*, 334 U. S. 182, 194 (1948).

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[13] "These opposing points of view as to MoPac's Articles are not easily resolved" (p 27a, *infra*). (The District Court had found the defendants' contention "to be without merit" (p. 4a, *infra*).)

"Here, again, we perceive no clearcut, free-from-doubt and positive answer" (p. 32a, *infra*).

"But we are not prompted to conclude, with any assurance . . ." (p. 32a, *infra*).

"[W]hile there are significant contrary arguments, we are not persuaded"; we are not convinced"; "we entertain doubt for the contrary result"; if we err in our conclusions" (pp. 34a-35a, *infra*).

[14] See 2 MOORE'S FEDERAL PRACTICE ¶ 12.08, at p. 2245 n. 6 (2d ed. 1964); 6 *ibid.* at pp. 2288, 2450.

The ICC and everyone else involved in the Fourth Plan of Reorganization certainly knew that mergers and consolidations require ICC approval under § 5(2)(a); and they were well acquainted with the requirements of fairness expressed in § 5(2)(b). Nevertheless, they all insisted on the further specific protection of class voting—and they knew full well that it covered mergers and consolidations (see p. 31, *infra*).

They also knew that the class voting right, as a provision of the plan of reorganization, was made binding on MoPac and all of its stockholders by § 77(f) of the Bankruptcy Act, 11 U.S.C. § 205(f).

This specific safeguard for the Class B was not an empty gesture in the Fourth Plan of Reorganization. Neither the ICC nor the parties, neither the District Court nor the Court of Appeals in 1955, ever suggested that the class voting right was unnecessary because in any event the ICC had to deal with questions of fairness under § 5(2). The Class B, as a minuscule voting minority, was not relegated to reliance only on the ICC's conception of fairness.

Class voting was the keystone of the Fourth Plan's stockholder structure. By depriving the Class B stockholders of class voting rights, the court below undid what the Fourth Plan of Reorganization achieved after two decades of litigation. The decision below would condemn the parties, the ICC, and the courts to years of further litigation arising from the struggle to preserve what the Fourth Plan of Reorganization gave to the Class B stockholders.

Reasons for Granting the Writ

1. The decision of the court below conflicts with the decision of this Court in *County of Marin* v. *United States*, 356 U. S. 412, that the substance and real purpose of a proposed transaction, not the mere form, determine whether the proposal comes within the scope of Section 5(2) of the Interstate Commerce Act. The court below, to the contrary, held that the substance and real purpose of the proposal are immaterial, and that as long as the proposal has the form of a consolidation, it automatically comes within the scope of Section 5(2). In relying exclusively on form, the court below would allow the controlling stockholder to use the Interstate Commerce Act (a) to destroy the valuable rights and equity of a class of stock possessing a minority of the voting power, (b) to destroy the protective class voting rights of the minority class granted by a plan of reorganization agreed upon by the parties, embodied in the charter, and approved by the courts pursuant to Section 77 of the Bankruptcy Act, and (c) to enrich the controlling stockholder at the expense of the minority class.

It is vital to the proper functioning of the ICC, and to the public interest in the regulation of carriers under the Interstate Commerce Act, that a sham proposal such as the one at bar not be allowed to engage the machinery of the ICC and the dignity of the Interstate Commerce Act simply by assuming the formal trappings of "consolidation". The court below has allowed precisely that to happen.

It is late in the day for any court to elevate form over substance in appraising a transaction's qualification under a federal statute. This Court has long since rejected the notion that "a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character" could thereby qualify for the benefits of the statute. *Gregory* v. *Helvering*, 293 U. S.

465, 469 (1935). This Court simply looked at the transaction and found that "the facts speak for themselves":

> "The whole undertaking, though conducted according to the terms of [the statute], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else." *Ibid.* at 470.

This Court held the plan to be

> "outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Id.*

The court below "exalt[ed] artifice above reality" to deprive § 5(2) of the Interstate Commerce Act "of all serious purpose."

This Court has had occasion to deal with "reality" versus "artifice" specifically in connection with § 5(2).

This Court ruled in *County of Marin* v. *United States*, 356 U.S. 412 (1958), that the real purpose and substance of a proposed transaction, rather than its mere form, will determine whether the transaction comes within the scope of § 5(2) of the Interstate Commerce Act.

The Court of Appeals below has just ruled to the contrary—that form alone will qualify a transaction under § 5(2) regardless of the true purpose and substance—and it says that this Court so held in *Marin*.

Any conflict or doubt as to what this Court ruled in *Marin* has consequences far beyond the immediate impact on the parties to this case; for *Marin* dealt with the fundamental question of congressional policy and purpose in fixing the scope and application of the Interstate Commerce Act.

In *Marin*, this Court said that "we must examine the proposed transaction in light of the congressional purpose

and statutory language." Having thus examined it, this Court found that "the alleged 'acquisition' amounts to little more than a paper transaction"—that what in form was an "acquisition" (requiring ICC approval under § 5(2)) was in substance a split-up. That purpose, according to this Court, "eliminates this transaction from the 'acquisition' language of § 5(2)(a)." 356 U.S. at 418, 419.

Therefore, this Court held, since the transaction in substance and purpose did not comply with the terms and purpose of § 5(2), the ICC had no jurisdiction to entertain it thereunder. This was an applied instance of the Court's general statement, a decade earlier, that the Interstate Commerce Act is applicable only to a proposed plan "which is within the scope of the Act". *Schwabacher* v. *United States*, 334 U.S. 182, 194 (1948).

But according to the court below, this Court did the very opposite in *Marin*. The court below says that this Court held the transaction in *Marin* not to be within ICC jurisdiction "because of the form of the transaction itself and not because of intent or motive of the parties." (P. 24a, *infra*.)

The court below rejected any consideration of the substance and real purpose of a transaction. To that court, form alone is determinative. *Marin* could not have been more flatly contradicted.[15]

There was no mystery to the court below as to what the scheme at bar would do to the Class B stockholders (see pp. 22a and 9a-10a, *infra*). Just as in *Marin*, an examination of the scheme suffices to reveal its true purpose and substance—in this case, an attempt to strip one class of

[15] The court below also misunderstood Betty Levin to have contended that a consolidation has to be "justified" to qualify under § 5(2). We take no position for the moment on whether a consolidation of MoPac and T & P is justified. What we do contend is that, if a consolidation is proposed, it must have the ring of true metal of a consolidation, and form alone cannot supply that ring.

stockholders of their valuable legal rights and property for the enrichment of another class, particularly for the majority stockholder of the railroad.

Such a purpose "eliminates this transaction from the [consolidation] language of § 5(2)(a)." 356 U.S. at 419.

The lower court's conclusion would provide a field day for ingenious wrongdoers—and it did so in this case. Obviously, if what Mississippi really wanted was a consolidation of MoPac and a subsidiary, it could have left the rights of the classes of stock completely intact and still had a consolidation.

Another court decision dramatically demonstrates the need for piercing the form and observing the substance and purpose of a transaction purportedly within the scope of the Interstate Commerce Act.

In *Wood* v. *United States*, 132 F. Supp. 586 (S.D. N.Y. 1955), the proposed transaction was a plan to alter and modify the capital stock of a railroad. In form, the plan literally complied with § 20b of the Interstate Commerce Act. But the court there ruled that the plan was not within the scope of the Act because the chief purpose was—as in the case at bar—to benefit one class of stockholders at the expense of another:

> "It would not be a constitutional exercise of power under the Interstate Commerce Act and would be in violation of the 'due process' provision of the Fifth Amendment for the Commission to approve a Plan which . . . has as its 'primary objective * * *' the elimination of the dividend arrearage on its first-preferred stock, thereby making a declaration of immediate dividends on its second preferred and common stock possible'. . . ." 132 F. Supp. at 594.

It is startling to read in the opinion of the court below that the court in *Wood* held that plan not to be within ICC jurisdiction "because of the form of the transaction itself

and not because of intent or motive of the parties" (p. 24a, *infra*). The court in *Wood* could not have been more emphatically insistent upon substance and purpose, not form, as the determinants in its holding that the plan was not within the scope of the Act.

In the case at bar, just as in *Wood*, the "primary objective" of the plan is to enrich one class of stockholders at the expense of another. So too in the case at bar, that same primary objective disentitles the plan even to get to the threshhold of ICC jurisdiction under the Interstate Commerce Act.

Questions of "fairness", conditions that the ICC may impose, and other matters within the province of the ICC under § 5(2) are beside the point. For when the primary objective of a plan removes the plan from the scope of the Act, the ICC has no jurisdiction to consider the plan in the first place.

All the foregoing boils down to the basic principle uttered after many rounds in the *St. Joe* litigation, to wit:

In determining whether a proposed plan comes within the scope of the Interstate Commerce Act—

> "The tail of form should not be permitted to wag the dog of substance." [16]

The court below, in treating the Interstate Commerce Act and the ICC as mere vehicles to be ridden by any applicant whose ticket bears the proper legend, invoked a version of national policy freighted with grave significance for the ICC, courts, carriers, and public.

For its reversal of the District Court, the Court of Appeals relied in part on what it asserted to be the con-

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[16] *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 216 F. 2d 832, 839 (5 Cir. 1954) (concurring opinion). The consequence of a plan's failure thus to come within the scope of § 5(2) is to moot any question of stockholder approval under § 5(11); there would be nothing calling for a vote.

gressional policy of the Transportation Act of 1940. First the court quoted the congressional declaration of policy (p. 19a n. 2, *infra*); and then the court rewrote it. Said the court below:

> "We are impressed with the significance of the national transportation policy and its emphasis on railroad consolidation" (pp. 34a-35a, *infra*).

In fact, however, the congressional declaration of policy is utterly devoid of any emphasis on railroad consolidation. That the omission was deliberate, is clear to the ICC:

> "The legislative history of section 5 clearly shows that the Congress did not adopt a policy fostering or encouraging railroad unifications. It was the Transportation Act of 1920, not the Transportation Act of 1940, that embodied a policy favoring railroad consolidations."

That correct statement is by the ICC in its recent decision rejecting the proposed merger of the Northern Lines.[17] The ICC continued as follows:

> "To interpret section 5 as implying such a policy [favoring railroad mergers] is a perversion of legislative history and intent. The public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger."[18]

The court below has interpreted the purpose of congressional legislation as facilitating the scheme in the case

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[17] *Gt. Northern Pac. & Burl. Lines—Merger—Gt. Northern Ry. Co.*, — ICC — (1966), Finance Docket No. 21478, p. 89.

[18] *Id.* The dissenting commissioners agreed with the above statement of policy: "The majority . . . are clearly right in believing that in any specific case the act is neutral and is weighted neither for nor against a proposal. . . ." *Ibid.*, p. 130. When this Court spoke of the purpose "to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States*, 356 U. S. 412, 416-17 (1965)), the reference was clearly to consolidations that qualify as such within the scope of the Interstate Commerce Act and that contribute to the national transportation system.

at bar just because it masquerades as a "consolidation". Such an interpretation makes a mockery of congressional purpose.

To enlist congressional policy in behalf of a transaction that is not merely a sham, but is one that would be found illegal by any court in the land, is a most serious compounding of error. Congressional policy was not designed to facilitate violations of fiduciary obligations. Of all the fraudulent schemes ever attempted by majority stockholders to skin the minority, no case records any so extreme—either in violation of fiduciary obligations or in sheer dollar amount—as the one at bar.[19]

However one may construe national transportation policy, one facet of that policy is perfectly clear: Voluntary mergers and consolidations were expressly made subject to the vote of the stockholders *as required under applicable State law.* 49 U. S. C. § 5(11).

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[19] See, *e.g., Jones* v. *Missouri-Edison Electric Co.,* 199 F. 2d 64, 70 (8 Cir. 1912), aff'd on rehearing 203 F. 2d 945 (8 Cir. 1913), cert. denied 229 U. S. 615 (1913); *Zahn* v. *Transamerica Corporation,* 162 F. 2d 36, 42, 46 (3 Cir. 1947); *Lebold v. Inland Steel Co.,* 125 F.d 2d 369 (7 Cir. 1941); *Heimbaugh* v. *Hitchcock,* 115 Kan. 182, 183, 222 P. 114, 115 (1924); *Doe Run Lead Co.* v. *Maynard,* 283 Mo. 646, 681, 223 S. W. 600, 610 (1920); *Windhurst* v. *Central Leather Co.,* 101 N. J. Eq. 543, 550, 138 A. 772, 775 (1927); *MacFarlane* v. *North American Cement Corp.,* 16 Del. Ch. 172, 178, 157 A. 396, 398 (1928); *Sterling* v. *Mayflower Hotel Corp.,* 33 Del. Ch. 293, 93 A. 2d 107, 109-110 (1952).

2. The ICC and the carriers, with the sanction of the courts, have uniformly observed charter provisions for stockholder voting in determining the vote required by Section 5(11) for mergers and consolidations under the Interstate Commerce Act. The court below not only disregarded the applicable charter provisions of MoPac, but also declined to determine the vote "required under applicable State law" as dictated by Section 5(11). Instead, the court below erroneously construed Section 5(11) as if there were no applicable State law. The court below has left in doubt and confusion the entire matter of the stockholder vote required for mergers and consolidations. Particularly in view of the vast increase in merger and consolidation proceedings before the ICC, it is in the public interest to dispel the doubt and confusion arising from the decision of the court below.

Section 5(11) of the Interstate Commerce Act provides that mergers and consolidations under § 5(2) are subject to the assent

> "of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote. . . ." 49 U.S.C. § 5(11).

The ICC and all carriers heretofore have uniformly observed charter provisions in determining the stockholder voting requirements for mergers and consolidations. Thus, if a charter provision calls for a class vote, then, without exception, the ICC has required such class assent by the stockholders for their approval of the merger or consolidation. Even MoPac itself, as well as Mississippi, in other proceedings before the ICC, clearly recognized that a charter requirement for class voting must be observed in

obtaining the necessary stockholder approval of mergers and consolidations.[20]

In the case at bar, the District Court concluded that, under the applicable Missouri law, the stockholder vote required for a plan of consolidation changing class rights is controlled by the charter provisions on class voting (p. 6a, *infra*). That conclusion stemmed from the Missouri statutes.[21]

The District Court, having thus found that a class vote is required under applicable State law, therefore decided that such class vote is the vote required by § 5(11) of the Interstate Commerce Act for stockholder assent to the proposed plan.

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[20] *Missouri Pac. R. Co.-Control-Chicago & Eastern Ill. R. Co.*, — ICC — (1965), Finance Docket No. 21755, p. 51 (see p. 6, *supra*, and p. 34 n. 34, *infra*).

For another recent instance of the uniform observance of class voting required by valid charter provisions (notwithstanding the absence of any statutory requirement for class voting) see Chicago & N. W. — Chicago, Milwaukee, St. Paul & Pac. R. Co. Joint Application [for consolidation] filed June 6, 1966, Finance Docket No. 24182, Exh. B-1, pp. 47, 50, 51.

The ICC's rule requiring observance of charter provisions on stockholder voting, 49 C.F.R. § 52.3, is printed in pertinent part in Appendix C hereto at p. 38a.

[21] The Missouri statutes provide that the charter shall set forth the respective rights of each class of stock. § 351.055. The MoPac charter does this in Article VII D, containing six numbered paragraphs (R. 11-15), including paragraph (3) setting forth the class voting rights.

Another section of the Missouri statutes provides that mergers and consolidations be approved by "at least" two-thirds of the shares. § 351.425. This of course does not preclude a charter provision requiring a more stringent vote, either by increasing the percentage or by adding a class vote.

In any event, § 351.270 specifically authorizes charter provisions to require a more stringent vote, specifically including a class or series vote; and that section also declares that such charter provisions shall control.

The decision of the District Court was clear and unequivocal, expressing no doubt at all as to the charter or the applicable Missouri law.

The Court of Appeals, however, not only (a) declined to accept the District Court's conclusion as to the vote required under applicable Missouri law, but also (b) declined to determine the vote required under applicable Missouri law. While the court recognized that there *was* applicable Missouri law, the court nevertheless fallaciously construed § 5(11) as if there were not any applicable Missouri law.

(a) The Court of Appeals for the Eighth Circuit has for many years consistently ruled that it would not disturb a decision of a district court on applicable state law, except for demonstrably clear error beyond doubt.[22]

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[22] "This Court has repeatedly ruled that it will accept the considered views of a District Judge as to doubtful questions of local law. Many of the cases in this Court and the Supreme Court which support that rule will be found in the case of Buder v. Becker, 8 Cir., 185 F. 2d 311, 315-316. * * * 'The burden of demonstrating error * * * is a particularly heavy one. This Court is not an appellate court of the State of Missouri * * * If a federal district judge has reached a permissible conclusion upon a question of local law, we will not reverse, even though we may think the law should be otherwise.'" *National Bellas Hess* v. *Kalis*, 191 F. 2d 739, 741 (8 Cir. 1951), cert. denied 342 U. S. 933 (1952).

The court has consistently applied that rule both to a district judge's interpretation of a contract (which is what a charter is) under Missouri law, see *Cavanagh* v. *Continental Casualty Co.*, 325 F. 2d 975, 977 (8 Cir. 1964), and also to a district judge's interpretation of Missouri statutes and their applicability, *e.g.*, *Wash* v. *Western Empire Life Insurance Co.*, 298 F. 2d 374, 378 (8 Cir., 1962); *State Securities Company* v. *Federated Mutual Implement & Hardware Insurance Co.*, 308 F. 2d 452 (8 Cir. 1962); *United States* v. *Myers*, 331 F. 2d 591 (8 Cir. 1964); *Southern Farm Bureau Casualty Insurance Co.* v. *Mitchell*, 312 F. 2d 485, 496 (8 Cir. 1963), and cases cited therein.

The same rule obtains in other circuits. See, *e.g.*, *Solomon* v. *Downtowner of Tulsa, Inc.*, 357 F. 2d 449, 451 (10 Cir. 1966); *Rudd-Melikian, Inc.* v. *Merritt*, 282 F. 2d 924, 929 (6 Cir. 1960).

That rule of not reversing a district judge as to the law of his state is so well-established in the Eighth Circuit that the court has authorized its clerk specifically to advise attorneys to keep it in mind.[23]

The same three-judge panel that decided this case (Van Oosterhout, Blackmun, and Mehaffy, Circuit Judges) applied that Eighth Circuit rule at least four times in the last year alone.[24]

This Court, too, gives "special weight" to a federal district judge's determination of the law of his state, in preference to a determination by the Court of Appeals. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204 (1956).

Why the panel below departed in this case from its own sound rule of respect for a district judge's permissible conclusions does not appear. The court below recognized that the state law questions—concerning the charter and Missouri statutes—were underlying questions in the case. It had before it the conclusions of an "experienced Missouri federal judge" on "the law of that State in arriving at his carefully considered opinion".[25] It did not find his views impermissible, much less "clear error".[26] And yet it reversed.

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[23] SUGGESTIONS TO ATTORNEYS CONCERNING APPELLATE RULES AND PRACTICE, by Robert C. Tucker, Clerk (WITH THE APPROVAL OF THE COURT [OF APPEALS FOR THE EIGHTH CIRCUIT]), p. 6.

[24] *Merrick* v. *Allstate Ins. Co.*, 349 F. 2d 279, 282 (8 Cir. 1965); *Lesser* v. *Wm. Holliday Cord Assoc. Inc.*, 349 F. 2d 490, 493 (8 Cir. 1965); *United States Fire Ins. Co.* v. *Cannon*, 349 F. 2d 941, 944-45 (8 Cir. 1965); *Hedberg* v. *State Farm Mut. Auto. Ins. Co.*, 350 F. 2d 924, 932-33 (8 Cir. 1965).

[25] *Homolla* v. *Gluck*, 248 F. 2d 731, 735 (8 Cir. 1957).

[26] *State Mutual Life Assur. Co.* v. *Wittenberg*, 239 F. 2d 87, 91 (8 Cir. 1957).

(b) But in reversing the District Court, the Court of Appeals did not determine the vote required under applicable State law. Instead, it professed perplexing doubts on the questions of state law determinative of the required vote (p. 13 n. 13, *supra*)—but it stopped short of making those very determinations which are required by § 5(11) of the Interstate Commerce Act.

As a result, the Court of Appeals landed in a morass of confusion and uncertainty on the voting issue. No amount of study of the court's opinion will yield a clear answer to the question: What is the vote required for assent to a plan of consolidation? At one point, the court says that the assent of a majority is required by § 5(11), as if there were no applicable State law at all.[27] But at another point, it recognizes that there *is* applicable State law, and indicates that a two-thirds aggregate vote is required.[28] The court seems, however, to tip the scale towards the former result—that is, to construe § 5(11) as if there were no applicable State law. But the court's opinion and its conclusion are far from clear.

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[27] "We conclude that a majority of all voting shares in the aggregate is the 'general standard and that the statute [§ 5(11)] bows in the direction of state law only with its phrase beginning with 'unless'. * * * All this compels us, when we entertain doubt for the contrary result, as we do here, to resolve that doubt on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions." (Pp. 34a-35a, *infra*.)

[28] "We do conclude that the proposed plan is one governed by [Missouri] chapter 351. But we are not prompted to conclude, with any assurance, that the general two-thirds-of-voting-shares standard embraced by § 351.425 is qualified by § 351.270 to the extent that it demands class voting if the articles seem to require it." (P. 32a, *infra*.)

At no point does the court below give any weight at all to the long-established decisions of the ICC. Carriers and the ICC are left in a quandary.[29]

If a federal appellate court finds genuine doubt as to underlying state law questions, and is reluctant either to accept the district court's answers or to decide for itself, it can have the parties get the answers from a state court, meanwhile holding the federal proceedings in abeyance. See, *e.g.*, *United Services Life Ins. Co.* v. *Delaney*, 328 F. 2d 483, 484-85, 487 (concurring opinion) (5 Cir. 1964).

The series of errors by the court below has import far beyond the case at bar. Many proposals to merge or consolidate carrier systems are now pending. Never before has the ICC been besieged by so many applications; and more are in the offing. They involve matters of vital public interest, and literally billions of dollars of stockholder investment.

Charter provisions stipulating separate class voting on a variety of matters are quite common. Many railroad charters contain such provisions. They are the method commonly employed to safeguard the interests of the respective classes.

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[29] The court below construed § 5(11) as embodying a policy *against* the vote required under applicable state law; such vote, said the court, is an "exception" to the majority-vote "rule" (pp. 25a, 34a-35a, *infra*). In fact, however, the majority-vote proviso was added in 1940 simply to fill the gap where there was no applicable state law at all for stockholder voting, such as where the state statutes do not permit mergers with out-of-state corporations, or where the railroad has a federal charter (such as T & P's). But always—both before and since 1940—mergers and consolidations under the Interstate Commerce Act have been understood by the ICC and all carriers and courts to be subject to approval by the stockholders voting in accordance with whatever applicable state law there may be. Congress simply confirmed this in 1940 with § 5(11).

Many carriers have charter provisions similar to Mo-Pac's; and the Missouri statutory scheme obtains in many other states.

The decision below has opened a Pandora's box. What vote shall the ICC and the carriers now require for stockholder assent? Shall they look elsewhere than to governing charter provisions to determine the required vote? Are pending merger applications faulty if stockholder approval was obtained in accordance with charter provisions for class voting? Shall they require, if not a class vote, a majority vote? A two-thirds vote? Shall the ICC tell stockholders to go back later, in merry-go-round fashion, to the district court and then to the court of appeals for a specific answer?

There is hardly a merger or consolidation proposal that is not fraught with a large variety of complicated and difficult problems. To compound them with the confusion and uncertainty created by the decision below on the one prerequisite—stockholder approval—heretofore clear and certain, would be detrimental to the public interest and to the many thousands of stockholders.

Since Congress required approval by stockholders in accordance with the voting requirements of applicable state law, the voting issue should not be left shrouded in doubt and uncertainty. Clarification and decision by this Court are urgently required in the public interest and the furtherance of an integrated national transportation policy.

3. The decision of the Court of Appeals repudiated the time-honored principle of judicial estoppel enunciated by this Court in *Davis v. Wakelee*, 156 U. S. 680. The Court of Appeals permitted the respondents, who had successfully maintained before the ICC that class voting is required for mergers and consolidations of MoPac, to repudiate their position and maintain the contrary in this case, simply because their interests had changed. Such repudiation is "contrary to the first principles of justice" enforced by this Court and by the courts of appeal—except the court below in this case. Such departure by the court below from the accepted standards of judicial integrity especially demands the exercise of this Court's power of supervision.

This Court stated the principle of judicial estoppel as follows:

> "[W]here a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U. S. 680, 689 (1895).[30]

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[30] A plaintiff secured a California judgment against the defendant, a New York bankrupt, but the defendant had not been served with process, so the judgment was void. When the defendant petitioned for his discharge from bankruptcy, the plaintiff objected and submitted original proofs of his claim. The defendant argued that the plaintiff had already reduced his claim to a judgment which was in full force and would survive the defendant's discharge. The bankruptcy court agreed, and dismissed the objection; the plaintiff acquiesced, and did not appeal. The plaintiff thereafter sued to enjoin the defendant from setting up the threatened defense that the California judgment was void for want of personal service. This Court held that, "as a matter of law," the defendant was "now estopped to take a different position."

> "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him." 156 U. S. at 691.

Nor could the defendant escape the rule by claiming that his prior position was mistaken; for if it was, he himself had made the mistake and taken the benefit of it at the plaintiff's expense. 156 U. S. at 690.

The purpose of judicial estoppel is to preserve the integrity and dignity of judicial proceedings. The abundant cases applying the principle do not record a more flagrant abuse of judicial process than in the present case.

This Court's statement of the principle, quoted above, describes exactly the situation at bar; no essential element is absent.

In proceedings before the ICC in 1961 (a scant two years before the scheme in this case was proposed), MoPac, already dominated by Mississippi, defeated the interests of the Class B stockholders by insisting that they have a class vote on mergers and consolidations.

In brief, the stage was set as follows:

Since the reorganization of MoPac, about 20,000 Class B shares—half of the MoPac common stock—have been widely held by relatively modest investors (some have owned just a few shares for many years), and the other half has been owned by one stockholder, Alleghany Corporation.

When the Class B common stock was issued, the ICC required Alleghany to put its half in an independent voting trust to insulate MoPac from even "negative control" by Alleghany, since one-half of the Class B carries the power to block mergers, consolidations, and other corporate actions changing class rights.

In 1961, Alleghany petitioned the ICC for permission to terminate the voting trust. Alleghany asserted that it should be allowed the normal prerogatives of stock ownership—i.e., direct voting rights—because MoPac was then engaged in merger discussions with other railroads. In such negotiations, MoPac stockholders—particularly the Class B stockholders—had a vital interest.

MoPac and Mississippi opposed Alleghany's petition before the ICC. At that time, Mississippi's chief executive officer was chairman of MoPac's Executive Committee, and Mississippi had at least five of its officers on MoPac's board.

Their express ground for opposing Alleghany's petition was that a majority of the Class B stock has the power to block mergers and consolidations. MoPac therefore contended that it should continue to be insulated from Alleghany's direct exercise of that power.[31] (R. 33, 55-56, 82-85.)

The ICC agreed with MoPac's contention, and denied Alleghany's petition. *Louisville & J. B. & R. Co. Merger,* Finance Docket No. 18656, Order dated March 7, 1962 (unreported). Alleghany acquiesced, and did not appeal.

It is basic to the administration of justice and the integrity of courts that "such brazen repudiation by a party of its own acts and assertions . . . is not legally permissible." *Continental Products Co.* v. *Com'r of Int. Rev.*, 66 F. 2d 434, 435 (1 Cir. 1933).

Some other railroads once tried MoPac's tactic of blowing hot and cold, but the Court of Appeals for the Third Circuit would not hear of it. *Seatrain Lines Inc.* v. *Penn-*

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[31] Alleghany, in full agreement with MoPac's understanding of the Class B's voting power, pointed out that but for such class voting rights, the Class A stockholders could strip away all of the rights and value of the Class B stock. MoPac, in response, did not dissent from Alleghany's reasoning, but merely reiterated its position as to the strategic class voting rights of the Class B stock on mergers and consolidations, citing as authority for such voting power *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939) (R. 82-84).

sylvania R. Co., 207 F. 2d 255, 259 (3 Cir. 1953).[32] The court had earlier explained the principle:

> "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. * * * And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."
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> *Scarano* v. *Central R. Co. of New Jersey*, 203 F. 2d 510, 513 (3 Cir. 1953).

If ever there were a case in which "intentional self-contradiction is being used as a means of obtaining unfair advantage", the case at bar is just that case. To sanction

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[32]Seatrain had instituted ICC proceedings to compel the railroads to make their freight cars available to Seatrain. The railroads opposed on the ground that the ICC had no jurisdiction as to those railroads not in "through-route" relationship with Seatrain. The ICC agreed with the railroads. Seatrain, defeated before the ICC, then sued those railroads to restrain their withholding of freight cars as a conspiracy to violate the antitrust laws. The railroads moved to dismiss on the ground that the ICC had primary jurisdiction. The Court of Appeals refused to entertain such an about-face, and held the railroads to their original positions:

> "This rule of repose is doubtly justified in the rare case in which the party who won on an issue in the first case attempts to obtain a contrary ruling in the second litigation, as the railroads are trying to do here." *Id.*

The court relied on both judicial estoppel and res judicata, although it did not use the former term. Casualness in the use of terminology for the several kinds of estoppel and res judicata is not infrequent. See Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946); Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Brooklyn L. Rev. 245 (1940).

such a practice, as the court below did, hardly qualifies the court as "a forum provided for suitors seeking justice."[33]

The Court of Appeals for the Eighth Circuit, prior to the case at bar, had a long and consistent record of prohibiting the same tactic of deliberate self-contradiction that it has just accepted from MoPac and Mississippi. See, *e.g.*, *Officer* v. *J. L. Owens Co.*, 252 F. 337, 342 (8 Cir. 1918); *Axelrod* v. *Osage Oil & Refining Co.*, 29 F. 2d 712, 729 (8 Cir. 1928); *City & County of Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 296 (8 Cir. 1927); *Sebastian Bridge Dist.* v. *Hedrick*, 4 F. 2d 346, 348 (8 Cir. 1925); *Moore* v. *Beiseker*, 147 F. 367, 375-377 (8 Cir. 1906); *Kansas Union Life Ins. Co.* v. *Burman*, 141 F. 835, 842-843 (8 Cir. 1905).

There is a more recent episode that underscores this abuse of judicial process practiced by MoPac and Mississippi and tolerated—contrary to its own prior decisions—by the court below.

While MoPac and Mississippi were successfully contending in the court below that class voting on mergers and consolidations is not permitted by § 5(11) and state law, they were *at the very same time* successfully contending the exact opposite before the ICC in another proceeding.

In the court below, MoPac and Mississippi argued that § 5(11) prohibits a class vote required by a charter provision, because, they said, the § 5(11) vote "required under applicable State law" does not mean a vote required by a charter provision that is merely authorized by state law.

But such construction of § 5(11) was discarded by MoPac and Mississippi before the ICC, where they successfully

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[33] The defendants, unable to deny their own self-contradictions, tried instead to argue that Alleghany too was guilty of a prior allegedly inconsistent statement. This was not only incorrect (see p. 29, n. 30, *supra*, and R. 81-82), but also beside the point. The defendants did not contend that any Class B stockholder was estopped by the prior alleged inconsistent statement of another Class B stockholder.

contended that another railroad's charter provision, authorized by state law, gave MoPac (as a minority stockholder in the other railroad) a class vote on mergers and consolidations. The same § 5(11), and indistinguishable state law, obtained in both the ICC proceeding and in the present case. Yet that did not deter MoPac and Mississippi from blowing hot and cold in the two proceedings.[34]

The self-contradictions did not stop there. In the court below, MoPac and Mississippi argued that it would not make sense to permit a class vote that gave to a small percentage of stock the power to block mergers and consolidations. They were so bold as to make that argument in court fresh from having just claimed the reverse before the ICC: that MoPac, with its 5% of the total stock of C & EI, could, by class voting, block mergers and consolidations of C & EI.[34]

It was, of course, the very smallness of the Class B's vote that impelled the parties, the ICC, and the courts to insist on the protective class voting provision in the Fourth Plan of Reorganization.

Courts throughout the nation have followed *Davis* v. *Wakelee, supra,* to prevent double-dealing in the administration of justice. The many cases, both old and new, attest that no other court would have entertained, much less adopted, assertions from litigants who had already prevailed before the ICC on contrary assertions.

Such intentional self-contradiction, if tolerated, so subverts justice and so undermines confidence in the federal courts that it imperatively calls for this Court to set it right.

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[34] *Missouri Pac. R. Co.—Control—Chicago & Eastern Ill. R. Co.*, —ICC—(1965), Finance Docket No. 21755, p. 51. The statutes of Indiana, where C & EI is incorporated, require stockholder approval of mergers and consolidations by a two-thirds *aggregate* vote "or such greater proportion as the articles of association . . . may

Beyond any single issue, there is a cloud hanging over this case:

Every applicable legal and equitable principle, every authority, was bent, tortured, or disregarded, and every doubt was resolved by the Court of Appeals, in favor of the majority stockholder of MoPac out to commit the grossest spoliation in the history of American railroad finance.

Something went seriously wrong with justice in this case.

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require". Ind. Stat. [Burns] § 55-2409 subd. (2). The C & EI charter requires a two-thirds *class* vote of the C & EI minority preferred stock for stockholder approval of mergers, consolidations and other important actions. MoPac acquired one-third of that minority class of C & EI preferred stock—constituting only 5% of the total C & EI stock—and took the position before the ICC that such one-third gave MoPac the power to block mergers and consolidations of C & EI. The ICC agreed. (The ICC went on to rule that since the power to block mergers and consolidations constitutes "control" for certain purposes under the Interstate Commerce Act, MoPac had violated the Act by acquiring the C & EI preferred stock without prior ICC approval.) *Ibid.* at 49-52 and App. A pp. 8-10; see also Reply of MoPac filed with ICC Feb. 5, 1962, pp. 10-15.

In 1961, MoPac had cited *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939), to the ICC as authority for the proposition that a small percentage of the stock, such as the MoPac Class B, could be given the power by charter provision to block mergers and consolidations (R. 84).

Since the purpose of judicial estoppel is to preserve the integrity of judicial proceedings, it does not turn on reliance or identity of parties.

Cardozo, *J.*, said of a defendant who had defeated one plaintiff on the ground that the agreement sued on was one of guaranty, and then in a subsequent action against a different plaintiff sought to contend that the agreement was not one of guaranty but of indemnity:

> "The defendant helped to induce that ruling when the result was to his advantage. We will not change it at his instance now when the result is to his detriment."

Assets Realization Co. v. *Roth,* 226 N. Y. 370 374, 123 N. E. 743, 744 (1919).

Conclusion

The writ of certiorari should be granted, the judgment of the Court of Appeals below should be reversed, and the order of the District Court below should be affirmed.

Respectfully submitted,

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Counsel for Petitioner.

July 15, 1966

APPENDIX A

Opinion of District Court, Dated July 13, 1964, at 233 F. Supp. 747

ROSE SLAYTON, et al.,
Plaintiffs,

v.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,
Defendants.

ALLEGHANEY CORPORATION, et al.,
Plaintiffs,

v.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,
Defendants.

BETTY LEVIN,
Plaintiff,

v.

MISSISSIPPI RIVER FUEL CORPORATION, et al.,
Defendants.

Nos. 63 C 436(2), 64 C 48(2), 64 C 77(2).

UNITED STATES DISTRICT COURT

E. D. MISSOURI, E. D.

July 13, 1964.

Order Sept. 18, 1964.

MEREDITH, *District Judge.*

These three cases, consolidated for the limited purposes of pre-trial discovery and hearings on motions, in major

part arise out of the agreement of the Boards of Directors of defendant Missouri Pacific Railroad Company (hereafter MoPac) and Texas and Pacific Railroad Company (hereafter T&P) to consolidated the two companies into Texas and Missouri Pacific Railroad Company (hereafter T&M), a new Delaware subsidiary of MoPac created for the purpose of the merger, upon approval of the merger by the Interstate Commerce Commission. Subsequent to the filing of the first of these cases, MoPac, T&P and T&M applied to the ICC for an order authorizing consolidation and issuance of securities by T&M. The application to the ICC, under 49 U.S.C.A. §§ 5(2) and 20a, stated, as had been announced earlier by MoPac, that the proposed merger plan would be submitted to their shareholders at an annual meeting on May 12, 1964, for approval by two-thirds of the aggregate of shareholders. Plaintiffs, all holders of Class B shares of MoPac, having filed these actions, defendants thereafter deferred any stockholders' meeting for approval of the proposed plan until the adjudication of the class voting right issue here involved.

Separate motions to dismiss have been filed by the defendant Mississippi River Fuel Corporation, owner of the majority of Class A shares of MoPac, and certain individual defendant members of the Board of Directors of MoPac and by defendant MoPac. The three cases are similar, but not identical, there being some divergence in allegations as well as type of relief sought by plaintiffs on behalf of themselves representatively as Class B stockholders and derivatively for defendant MoPac. Similarly, there is a variety of and various combinations of relief sought—declaratory, injunctive and money damages. However, common to all three cases is the demand for a declaratory judgment that the proposed consolidation requires the approval of separate majorities of both Class A and Class B stockholders of MoPac. Defendants' separate motions to dismiss are directed to all phases of the several com-

plaints, but we here treat such motions only as they relate to the declaratory issue of class voting rights on the proposed plan of consolidation. On this issue defendants seek dismissal on the ground that the complaints and the exhibits thereunto attached show on their face that plaintiffs are not entitled to so vote and fail to state a claim on which relief can be granted. The matter has been fully briefed by all parties and on April 10, 1964, oral argument was heard by the Court.

For the purpose of the motions, the allegations of fact in the complaints and the inferences reasonably to be drawn therefrom must be taken as true and not in issue. We therefore discuss the factual allegations as though proven and conclude as to the law. The crux of the issue presented is whether or not the plan of consolidation as approved by MoPac must be concurred in by separate majorities of Class A and Class B shareholders of MoPac.

Paragraphs 3 and 4, Article VII, Section D, of the Articles of Association of Missouri Pacific Railroad Company provide:

> "(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights

of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as oterwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. In all elections of directors each stockholder may cast as many votes in the aggregate as shall equal the number of voting shares which he is entitled to vote multiplied by the number of directors to be elected at the election, and each stockholder may cast the whole number of votes, either in person or by proxy for one candidate, or distribute them among two or more candidates, and the directors shall be those persons, in a number equal to the vacancies to be filled, who shall receive the greatest number of votes."

Defendants urge first that since neither "merger" nor "consolidation" is in terms employed in paragraph 3 of Section D of Article VII, the plan for consolidation necessarily falls within paragraph 4 of Section D of Article VII as "any other action" not requiring class voting. We have considered but found this contention to be without merit since what is proscribed by paragraph 3(c), Section D of Article VII, is "company action" without the consent of the majority of each class of shareholders, altering or changing the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A

stock or of the Class B stock without regard to the purpose of such company action, whether it be merger, consolidation or otherwise. The article does not attempt to set out specific types or methods of company action which might be employed to alter or change the relative rights. In plain language, it prohibits, unless class voting is observed, company action, without limitation and without specification as to type or method when such action "alter(s) or change(s) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock * * *."

Defendants next urge that since MoPac is not to be the surviving corporation and the proposed consolidation will, if consummated, eliminate MoPac, the action will not be MoPac Company action, but rather that of T&M. Suffice it to say that the proposed merger is the subject of an agreement entered into by MoPac on the authorization of its Board of Directors, and that MoPac at least recognizes that its consummation, resulting in the elimination of MoPac, requires at least some action by its shareholders even though questioning the requisite needed for approval. We conclude that the agreement to consolidate entered into by MoPac constitutes company action by defendant MoPac within the meaning of paragraph 3 of Article VII D if such consolidation as proposed would result in the effects enumerated in paragraph 3(c) and (d).

Thus, the ultimate question is whether the proposed plan of consolidation or merger involves "alter(ing) or chang(ing) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock" or amends or eliminates any of the provisions of paragraph 3 of Article VII D. If it does, separate majorities of both classes are required for approval by terms of the Articles of Association, adopted pursuant

to the plan of reorganization of MoPac under Section 77 of the Bankruptcy Act, which plan was approved by the ICC on or about July 29, 1954 (290 ICC 477), approved by this Court on February 25, 1955, and confirmed by this Court on September 19, 1955.

Under applicable Missouri law, the voting requirements for adoption of the proposed plan are controlled by the Articles of Association of Missouri Pacific Railroad Company, RSMo 1959, § 351.270.

Further, under 4 U.S.C.A. § 5(11), a carrier's authority to merge or consolidate as approved by the ICC is conditioned on the assent "of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, . . ."

The Class A and Class B shares of MoPac were issued pursuant to the aforesaid plan of reorganization.

The issued and outstanding capital stock of MoPac consisted, as of December 16, 1963, of 1,849,576 shares of Class A no par value stock and 39,731 shares of Class B no par value stock.

Defendant Mississippi owns 1,071,895 shares of Class A stock of MoPac, or about 57% of the number of shares of the entire issued and outstanding stock of MoPac.

MoPac owns approximately 83.6% of the only class of issued and outstanding stock of The T&P.

Plaintiffs Slayton, Proskauer, Mendelsohn, Alfred L. Rose and Dorothy B. Rose are the owners of 260 shares of Class B common stock of MoPac.

Plaintiff Alleghany Corporation is the beneficial owner of in excess of 20,000 shares of Class B common stock of MoPac.

Plaintiff Empire Trust Company holds the shares of Class B common stock of MoPac, of which plaintiff Alleghany is the beneficial owner, as voting trustee for Alleghany.

Appendix A: Opinion of District Court

Plaintiff Levin is the owner of 85 shares of Class B common stock of MoPac.

Class A shares of the reorganized company were issued to the preferred stockholders of the debtor corporation on the basis of one Class A share for each share of old preferred stock and one Class A share for each $100 of dividends accrued on the old preferred stock.

The Class B shares of the reorganized company were issued to the common stockholders of the debtor corporation on the basis of one share of Class B stock for each 20 shares of old common stock.

In approving the plan of reorganization, the ICC declared that since the Class A stock was issued to the preferred stockholders of the debtor corporation in the entire amount of the par value of their stock plus unpaid dividends, the Class A stock of the reorganized company should not participate in the earnings of the reorganized company beyond non-cumulative dividends not to exceed $5.00 per share in any one year and should not participate in the assets of the reorganized company beyond $100 per share and further declared, in providing for the issuance of the Class B stock in the reorganized company to the common stockholders of the debtor corporation, that the Class B stock would be entitled to all residual earnings and assets after the limited participation provided for the Class A stock (290 ICC 477, pp. 598, 600).

The plan of reorganization as formally approved by the ICC directed:

> "The certificate of incorporation (of the reorganized corporation) shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any

other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding." (290 ICC 477, p. 665)

The preferences, qualifications, limitations, restrictions and special and relative rights of the Class A stock and the Class B stock, as provided by the Articles of Association of MoPac, as amended pursuant to the aforesaid plan of reorganization and as approved and directed by this Court, include the following:

Class A Stock. The Class A stockholders shall be entitled to receive, when and as declared by the Board of Directors, dividends in cash in an amount not exceeding $5.00 per share in any calendar year. Such dividends shall be noncumulative without regard to the availability in any calendar year of earnings or any other funds lawfully available for the payment of dividends. Dividends paid on the Class A stock shall not in any event exceed $5.00 per share in any calendar year. In the event of any liquidation or dissolution or winding up of MoPac, the Class A stockholders shall be entitled to receive, out of the assets of MoPac available for distribution to its stockholders, $100 per share together with any dividends declared and unpaid on the Class A stock.

Class B Stock. After full $5.00-per-share dividends upon the Class A stock to the end of any current calendar year have been paid, or declared and a sum sufficient for the payment thereof set apart for such payment, the Class B stockholders shall be entitled to receive such dividends, without restriction as to amount, as may be declared by the Board of Directors from any funds lawfully available therefor. In the event of any liquidation or dissolution or winding up of MoPac, the Class B stockholders shall be entitled, to the exclusion of the Class A stockholders, to receive all the as-

sets of MoPac remaining after satisfaction of the claims of the Class A stockholders as aforesaid.

Under the proposed plan of consolidation, each Class A and each Class B share of MoPac would be exchanged for four shares of $25 par value common stock of the consolidated company and each share of the T&P would be exchanged for four shares of $25 value common stock in the consolidated company.

The proposed consolidation (under which Class A shares, entitled to dividends limited to $5.00 per year and to $100 per share on liquidation or dissolution to $100 per share, and under which Class B shares, entitled after payments of Class A $5.00 dividends to unrestricted dividends, save as they are declared by the Board of Directors, and upon liquidation or dissolution, entitled to receive all assets remaining after satisfaction of Class A claims, are both to be exchanged for identical common shares of a new company) seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion. It matters not to whose advantage the plan accrues nor whether the plan be fair or unfair. The question is whether the two classes' relative rights, restrictions and limitations are to be altered and changed. It is patent that alteration and change of relative rights, preferences and limitations and restrictions in respect to dividends and upon dissolution are inherent in the plan for the exchange of the two classes of stock for identical common stock in the proposed new company. We draw such a conclusion without regard for the graphically demonstrated financial effect of the exchange contemplated:

As of September 30, 1963, the consolidated net assets of MoPac were $394,721,242. The equity of the Class A stock in such assets, limited to $100 per share, was $184,957,600 or 47% of the total. The remaining equity of

$209,763,642, constituting 53% of the total, accrued to the Class B stock, equivalent to $5,280 per share.

Consummation of the proposed plan would, as at September 30, 1963, give to the holders of the Class B stock of MoPac, in exchange for their Class B stock, common stock of the consolidated corporation having an equity value of $7,917,594 (the equivalent of $199 per share of Class B stock), or 2% of the total, in the consolidated corporation, and would give to the Class A stockholders of MoPac, in exchange for their Class A stock, common stock of the consolidated corporation having an equity value of $368,523,721 (the equivalent of $199 per share of Class A stock), or 94.6% of the total (the remaining 3.4% going to the minority stockholders of the T&P), in the consolidated corporation.

Consummation of the proposed plan not only would change the present relative participation in equity of the Class A and Class B stockholders in MoPac from 47% and 53%, respectively, to 98% and 2%, respectively, in the consolidated corporation, but also would destroy the Class B stockholders' constantly accruing percentage increase of the total equity and fix the relative equity participation of the Class B stockholders in the corporate enterprise permanently at 2%.

The plan of consolidation, if consummated, will result in the elimination of MoPac. Hence, we conclude also that such elimination of MoPac will obliterate the provisions of paragraph 3 of Article VII, Section D, which, thus, will require for approval a majority of the number of Class A shares of MoPac and a majority of the number of Class B shares of MoPac as provided by Article VII, Section D, Paragraph 3(d).

It, therefore, follows that defendants' motions to dismiss as they relate to class voting rights on the proposed plan of consolidation will be overruled. Decision on all other issues raised by the motions to dismiss will be reserved.

APPENDIX B

Opinion of Court of Appeals for the Eighth Circuit, Dated April 19, 1966

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,836

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES M. KEMPER, JR., and MISSOURI PACIFIC RAILROAD COMPANY,
Appellants,

v.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE and DOROTHY B. ROSE: ALLEGHANY CORPORATION, and EMPIRE TRUST COMPANY, a Corporation, as Voting Trustee: and BETTY LEVIN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

[April 19, 1966.]

Before VAN OOSTERHOUT, BLACKMUN, and MEHAFFY, Circuit Judges.

BLACKMUN, Circuit Judge.

This litigation is a chapter in the struggle between the holders of the respective majorities of the two classes of outstanding shares of the Missouri Pacific Railroad Company (MoPac).

The district court has denied defense motions to dismiss complaints in three separate diversity actions instituted by certain Class B shareholders of MoPac. The

court's ruling was one restricted to the declaratory issue of the necessity of voting by classes on a proposed plan of consolidation of railroads. Decision on all other questions was reserved. *Slayton* v. *Missouri Pac. R.R.*, 233 F.Supp. 747 (E.D. Mo. 1964). The trial court has certified the matter under 28 U.S.C. § 1292(b) and this court has permitted the appeals from the interlocutory order. Further proceedings have been stayed.

MoPac, a Missouri corporation and an interstate common carrier by railroad, emerged as of January 1, 1955, from reorganization proceedings which had been pending under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, for more than 22 years. See *Missouri Pac. R.R. Reorganization*, 290 I.C.C. 477 (1954); *In re Missouri Pac. R.R.*, 129 F.Supp. 392 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 225 F.2d 761 (8 Cir. 1955), cert. denied 350 U.S. 959; *In re Missouri Pac. R.R.*, 135 F.Supp. 102 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 229 F.2d 898 (8 Cir. 1956). It so emerged without preferred stock but with two classes of $100 stated capital no par voting common: Class A, which is preferentially entitled to noncumulative dividends of not to exceed $5 per share per year, and, upon liquidation or dissolution, to $100 per share plus declared but unpaid dividends; and Class B, as to which earnings and equity in excess of the Class A preferences are available. The Class A shares replaced MoPac's old preferred and accumulated dividends thereon and the Class B shares replaced MoPac's old common.

Among the well-pleaded facts alleged in one or more of the three complaints and therefore, for purposes of these motions to dismiss, to be accepted as true, *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Bonnot* v. *Congress of Independent Unions*, 331 F. 2d 355, 357 (8 Cir. 1964), are the following:

a. MoPac has outstanding 1,849,576 shares of Class A stock and 39,731 shares of Class B stock.

Appendix B

b. The Texas and Pacific Railway Company (T&P) was incorporated by Act of Congress in 1871 and is an interstate common carrier by railroad. It has outstanding 445,464 shares of one class of stock. MoPac owns 369,111, or 82.86%, of these shares.

c. Mississippi River Fuel Corporation (Mississippi) is a Delaware corporation. It began acquiring MoPac Class A stock in 1959. It now owns in excess of 1,071,895, or 57.85%, of the Class A shares.

d. Alleghany Corporation (Alleghany) is a Maryland corporation. Since 1958 it has owned beneficially in excess of 20,500, or 51%, of the Class B shares of MoPac. This holding is subject to a voting trust agreement between Alleghany and Empire Trust Company, a New York corporation, as voting trustee.

e. The individual plaintiffs, totaling six in the three suits, own the following amounts of MoPac's Class B shares: Rose Slayton, not stated (but presumably 10 shares); Joseph M. Proskauer, 100; Walter Mendelson, 50; Alfred L. Rose, 50; Dorothy B. Rose, 50; Betty Levin, 85.

f. Most of the named individual defendants are the present directors of MoPac. Some of them are also directors and officers of Mississippi and of T&P. Neither Mississippi nor any of the individual defendants, with one exception, owns any of MoPac's Class B shares.

g. Texas & Missouri Pacific Railroad Company (T&M) is a newly organized Delaware corporation. Its equity capital consists solely of $25 par common stock.

h. MoPac's Articles of Association provide, Article VII, Section D(4), that, except for restrictions specified in Section D(3), or as otherwise required by law, each share of Class A and each share of Class B "shall have the same voting power" and that the vote of the holders of

any class of stock, as a class "shall not be required for any other action whatsoever . . . including any amendment to the Articles of Association". Section D(3), however, states that four kinds of corporate change shall not be effected without the consent of the record holders of a majority of the Class A shares and of a majority of the Class B shares. These are: (a) the issuance of additional shares; (b) the creation or issuance of any MoPac obligation or security convertible into or exchangeable for MoPac shares; (c) an alteration or change in "the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock"; and (d) the amendment or elimination of any of the provisions of Section D(3). The exact language of these portions of the MoPac Articles is set forth in the margin.[1]

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[1] Article VII, Section D.

"(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . ."

Appendix B

i. In December 1963 the board of directors of MoPac and T&P approved an "Agreement and Plan of Consolidation" which would effect the consolidation of MoPac and T&P into T&M as the surviving corporation. The plan provides that each share of MoPac, both Class A and Class B, shall be exchanged for four shares of T&M and that each share of T&P (other than those owned by MoPac) shall be exchanged for 4.8 shares of T&M.

j. MoPac's board announced that its Class B shareholders are not entitled to vote on the plan separately and apart from its Class A shareholders and that it intended to submit the plan only to the collective vote of Class A and Class B.

k. In January 1964 MoPac, T&P and T&M filed their joint application with the Interstate Commerce Commission for an order, under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), authorizing the proposed consolidation and, under § 20a, 49 U.S.C. § 20a, authorizing the issuance of securities by T&M. In this application MoPac stated that it intended to submit the proposed plan to its shareholders for approval, as contemplated by § 5(11) of the Act, 49 U.S.C. § 5(11), by May 1964 by the shareholders' collective vote.

We note parenthetically at this point that, while Mississippi owns the majority of MoPac's outstanding Class A shares and Allegany beneficially owns the majority of MoPac's outstanding Class B shares, Mississippi obviously owns the majority of the total of Class A and Class B. We note further that, under the plan, the proposed one for four exchanges of both Class A and Class B for T&M shares would result in the present Class B holdings being engulfed by the larger number of Class A holdings.

In 1963, after the boards' approvals of the plan but prior to its submission to the ICC, Class B shareholder

Slayton instituted the first of the three suits with which this appeal is concerned. The four plaintiffs Proskauer, Mendelson, and Rose have been permitted to intervene in that suit. The action is one against MoPac, Mississippi, and twelve individual defendants. The complaint as amended alleges, among other things, that the plaintiffs bring the action on behalf of themselves, representatively on behalf of all other (approximately 1200) Class B shareholders of MoPac, and derivatively on behalf of MoPac itelf; that since about 1960 Mississippi "did and it now does control MoPac, select and dominate its directors and principal executives and determine its policies and the conduct of its affairs"; that Mississippi acquired this control illegally; that the plan "is grossly unfair and inequitable" to the Class B shareholders; that the value of one Class B share is many times greater than the value of one Class A share; that the plan is "a fraudulent and manipulative device adopted by defendants to enhance the value of the Class A shares at the expense and to the detriment of the holders of the Class B shares"; that the proposed consolidation "serves no valid or legitimate business purpose" of MoPac; that the adoption of the plan by MoPac's board "results from the illegal exercise by Mississippi of its control over" MoPac; that the approval and consummation of the plan would cause irreparable injury to the Class B shareholders; and that the call of a MoPac shareholders' meeting to vote on the plan would cause irreparable loss and expense to MoPac. The prayer asks for damages and an injunction and also for a declaration that the Class B shareholders are entitled to vote on the plan separately and apart from the Class A shareholders.

The second action was instituted by Alleghany and Empire in February 1964. It names MoPac, Mississippi, and 12 individuals as defendants. The third action was instituted in the same month by plaintiff Levin on behalf

of herself and all other Class B shareholders and derivatively on behalf of MoPac. It names as defendants Mississippi, MoPac, T&P, and 16 individuals. Generally, the allegation and prayers for relief in the complaints in these two suits are similar to those in the Slayton complaint. One or both of them, however, contains allegations to the effect that the pursuit of the plan before the ICC will irreparably damage the Class B shareholders and effect a waste of the corporate assets of MoPac; that the class voting issue is one which lies within the jurisdiction of the district court and "not within either the purview or jurisdiction of the Interstate Commerce Commission"; and that the defendants are engaged in a course of conduct calculated to enrich themselves at the expense of the Class B shareholders. Each complaint raises the question whether approval of the plan is subject to class vote by MoPac and each requests, in addition to other relief, a declaration that the plan requires the approval of the holders of the majority of the outstanding Class B shares.

Motions to dismiss the respective complaints were filed. Submission of the plan to the MoPac shareholders was then deferred. The several motions assert, among other things, that (a) the district court is without jurisdiction to pass upon the merits of the plan or the lawfulness of submitting it to MoPac shareholders and to the ICC because sole jurisdiction as to this is exclusively in the ICC and the plaintiffs therefore have an adequate remedy under §5 of the Interstate Commerce Act, and (b) the complaints on their face show that the holders of Class B shares are not entitled to vote separately on the plan.

The parties agreed to a limited consolidation of the cases for the hearing of motions. They also agreed that the court should first pass on the voting rights question. It was recognized that if the court decided that a favorable sep-

arate vote of the Class B shareholders was necessary for the approval of the plan, then, in view of Alleghany's stated specific opposition, other questions might not require decision. Accordingly, the district court directed its attention to this initial and particular issue.

The court held, pp. 749-52 of 233 F. Supp., that said Section D(3) of MoPac's Articles did prohibit "In plain language, . . . unless class voting is observed, company action" which alters or changes the relative rights of the two classes of stock; that the agreement to consolidate constitutes company action by MoPac; that under Missouri law, namely, V.A.M.S. § 351.270, the voting requirements are controlled by MoPac's Articles; that, in addition, under § 5(11) of the Interstate Commerce Act, a carrier's authority to consolidate is conditioned; that the proposed consolidation here "seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion"; that the plan not only would change the present relative participation in equity but also would destroy the Class B shareholders' constantly accruing percentage increase of the total equity and fix their equity participation permanently at 2%; that the plan will result in the elimination of MoPac and the obliteration of Section D(3); and that it thus requires for approval a majority of the Class A shares and a majority of the Class B shares. In this posture the case comes to us.

We reverse.

We are concerned here with a proposed plan for consolidation of two interstate common carriers by railroad, MoPac and T&P, with the new T&M as the surviving corporation. This contemplated move is obviously subject to the provisions of the Interstate Commerce Act and particularly to § 5 thereof.

Appendix B

It seems evident, then, that our approach to the case must begin with the National Transportation Policy [2] enunciated by Congress as part of the Transportation Act of 1940, 54 Stat. 898, 899, 49 U. S. C. proceeding § 1.

The Supreme Court has stated that the policy "specifies in its terms that it is to govern the [Interstate Commerce] Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured". *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83, 87-88 (1957). The policy is therefore to be borne in mind, specifically, in connection with the federal statutes governing railroad consolidation. Those statutes, furthermore, have a significant and well-known history of their own which merits brief mention here.

At the conclusion of World War I, when the government was planning to return the country's raliroads to private ownership, many smaller roads were financially weak and their survival was questionable. This prompted the Transportation Act of 1920, 41 Stat. 456, 481, by which Congress

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[2] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act . . . shall be administered and enforced with a view to carrying out the above declaration of policy."

directed the ICC to take the initiative in developing a plan for the consolidation of American railroads "into a limited number of systems". There was, however, serious disagreement as to whether the Commission should be given the power to compel consolidation. In the end, the legislation provided that, although the Commission could promulgate a plan, it possessed no power to implement the plan. This, perhaps understandably, proved inadequate. The 1940 Act then relieved the Commission of its duty to provide a national consolidation plan. Initiation of mergers and consolidations remained, as before, in the hands of the carriers. "Thus, hostility to the consolidation of railroads except by the voluntary action of the merging roads has been the undeviating policy of Congress since 1920". *St. Joe Paper Co.* v. *Atlantic C.L.R.R.*, 347 U. S. 298, 305, and appendix, pp. 315-21 (1954); *County of Marin* v. *United States*, 356 U. S. 412, 417 (1958); *Schwabacher* v. *United States*, 334 U. S. 182, 191-193 (1948).

Marin tells us that the purpose of the 1940 Act's "sweeping revision of § 5 . . . was to facilitate merger and consolidation in the national transportation system", p. 416 of 356 U. S. And *Schwabacher* informs us that the tenor of prior Supreme Court decisions "was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest"; that the 1940 Act authorized approval by the Commission of voluntary consolidation of the kind contemplated by § 5(2)(a) if it will be consistent with the public interest, if, subject to any modification made by the Commission, it is just and reasonable, and if there be assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the

shares entitled to vote"; § 5(2)(b) and (11); that "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority"; that the Commission was given complete control of the capital structure to result from a merger; that the "jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority"; that "the Commission must look for standards in passing on a voluntary merger only to the Interstate Commission Act"; and that rights of dissenting stockholders "are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable". Pp. 192, 194, 195, 197, 198, and 201 of 334 U. S.

We necessarily assume that these pronouncements of the Supreme Court mean exactly what they say. We regard as significant the Court's emphasis on (a) the lodging of responsibility over railroad mergers in the Commission and not elsewhere; (b) the voluntary initiation by the carriers themselves of proposals for consolidation; and (c) the basic supremacy of federal law.[8]

We must recognize, too, that the merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for our jurisdiction or our concern, or for the jurisdiction or concern of the district court. These are for the expertise of the Interstate Commerce Commission. The Act, both in § 5(11) and in § 20a(7), is specific. Commission action in

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[8] It is of interest to note that Mr. Justice Frankfurter, in speaking for the dissenters in *Schwabacher*, said, p. 205 of 334 U. S.:

> "The Court now holds that State law governing the relations between the State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger. . . ."

this area is then subject to review by a three-judge district court, 28 U.S.C. §§ 2321-25, with direct appeal to the Supreme Court, 28 U.S.C. § 1253.

There should be no argument as to this. The plaintiffs here do not really contend otherwise. Yet they devote substantial portions of their several briefs in expounding and protesting the proposed plan and its adverse and assertedly inequitable effects upon the Class B shareholders. We can sympathize, and we appreciate why the plaintiffs indulge in this approach. One observes readily what the proposed plan appears to do to the Class B holdings. See pp. 751-52 of 233 F. Supp. But we lay these aspects generally to one side because they bear primarily upon the plan's merit and thus constitute grist for the Commission and not, at this time, for the courts.

We conclude that the proposed consolidation and the plan for effectuating it are the very things which congressional policy has earmarked and preempted for the Commission, that jurisdiction over them normally and presumptively rests with that agency, and that anything contrarily indicated by state law or by state charter must give way except when clearly recognized by the Interstate Commerce Act itself. We therefore are relegated to consider here only whether there is anything in the Act, which, directly or by deference to MoPac's Articles or to Missouri law, prevents or affects the Commission's exercise of this jurisdiction.

1. The Interstate Commerce Act. Section 5(2)(a) provides that it shall be lawful, with the approval and authorization of the ICC, for two or more carriers to consolidate or merge. The section then goes on to outline the administrative procedures to be followed in achieving

this end. Section 5(11)[4] grants the carrier full power, when the transaction is approved by the Commission, but with an important parenthetical restriction, "to carry such transaction into effect . . . without invoking any approval under State authority"; relieves the carriers from the operation of the antitrust laws "and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal" as may be necessary to enable them to carry into effect the Commission-approved transaction; and recites that any power given any carrier by the sec-

[4] § 5(11). "The authority conferred by this section shall be exclusive and plenary and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

tion "shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".

This is broad and incisive language. We find nothing in the Act with respect to shareholder voting other than the parenthetical material in § 5(11). That material is the sole instance where the statute bows in the direction of state law.

What, then, does the statute's parenthetical language mean? And does it have application here? One immediately observes five phrases: (a) "a corporate consolidation", (b) "the assent . . . of a majority", (c) "unless a different vote", (d) is "required under applicable State law", and (e) "in which case the number so required shall assent".

No one disputes that what is sought here is a factual consolidation of MoPac and T&P. The proposed transaction would seem to qualify, then, as something to which § 5(2) and (11) and Commission jurisdiction and the parenthetical phrase all have application. Plaintiff Levin argues, however, that whether a transaction is a consolidation at all within the meaning of § 5(2) depends, wholly apart from its trappings, upon "essential character" or "primary objective". She cites *Marin*, supra, and *Wood v. United States*, 132 F. Supp. 586 (S.D.N.Y. 1955), in support of this approach. In those cases the courts held transactions not to be within Commission jurisdiction. They did so, however, because of the form of the transaction itself and not because of intent or motive of the parties. *Marin*, for example, concerned a corporate division or split-up, not a consolidation; at pp. 418-19 of 350 U. S. the Supreme Court expressly stated that the question of justification for the proposed transaction was not before it. We therefore are not persuaded by the Levin argument that motive of itself is a determinative factor

in a transaction's qualification as a "corporate consolidation" within the language of § 5(11). See *Cleveland, C. C. & St. L. Ry.* v. *Jackson*, 22 F. 2d 509 (6 Cir. 1927).

Accepting the conclusion that the parenthetical material is applicable here, it is evident that the primary standard of application is a vote of the majority of all the voting shares. The statute speaks, in the first instance, "of a majority . . . of the votes of the holders of the shares entitled to vote". Departure from this standard is, then, the exception and not the rule.

This takes us to the vital and determinative phrase, "required under applicable State law". State law in this case is Missouri's. A review of that law requires, first, a more detailed examination of MoPac's Articles.

2. MoPac's Articles. What, precisely, does Section D (3) and (4) mean and to what extent, if any, is it controlling here? The pertinent provisions of D(3) and (4) are quoted in footnote 1, supra. In requiring a vote by classes on the four specific matters the Articles state that "The Company shall not . . .". MoPac and Mississippi assert that this provision regulates only "internal" or "intracorporate" action and has no application to a consolidation. Thus, it is said, any alteration of dividend or liquidation rights of MoPac's shares or of the provisions of D(3), upon the adoption of the proposed plan, would result from the consolidation and not from action by "The Company".

There is other argument in support of a restrictive interpretation of D(3), namely, (a) that nowhere in D(3) is there any reference to merger or consolidation, that is, to external action; (b) that, nevertheless, merger and consolidation obviously were not overlooked by the draftsman of the Articles for these are contemplated by the National Transportation Policy, are frequent among railroads, were considered in the MoPac reorganization proceedings and, in

fact, are mentioned in D(2); (c) that nowhere in the Articles are there protective provisions for any class of stock in the event of a merger or consolidation; (d) that D(4) establishes the denial of class voting as the rule and not as the exception; (e) that special preference is to be created only by clear and unambiguous language; (f) that this standard should not be weakened by implication, particularly when a consolidation, before it can be effectuated, must be found by the Commission to be just and reasonable and consistent with the public interest; (g) that the history of the MoPac reorganization discloses an initial conviction on the part of the Commission and the courts, continuing through the third plan, that the old common was valueless, see *Texas* v. *Group of Institutional Investors*, 191 F.2d 265, 273-74 (8 Cir. 1951), cert. denied 342 U.S. 904, 918 and 343 U.S. 929, and that, with respect to the subsequently approved Agreed System Plan, the Commission refused to give the Class B stock even as much as 4% of the voting power and limited it to 2%; and (h) that it is inconceivable that it was intended to give a veto power over a consolidation to MoPac's old common shareholders, who had, at the most, only a "possible future equity", or, to put it another way, to give the veto to a bare majority, or perhaps even less, of 2% of the outstanding shares (in this case Alleghany alone), irrespective of how well the consolidation might serve the interests of the railroad, its creditors, and the public.

There is contrary argument. This is to the effect (a) that the proposed plan will indeed accomplish a change in "the preferences, qualifications, limitations, restrictions and special or relative rights" of the Class A and Class B shares, within the meaning of D(3); (b) that MoPac will necessarily be a participant for, although T&P and T&M also must act, the plan will not come about without the approval of MoPac's board and shareholders; (c) that, thus, there is company action; (d) that it is the end result,

not the means, which is significant; (e) that the purported distinction between "internal" and "external" has no basis in the Articles and is arbitrary; (f) that were a consolidation to be excluded from the prohibitory language of D(3) it would have been expressly stated, just as it was in D(2); (g) that MoPac's old common shareholders received recognition in the reorganization, as finally consummated, not as a matter of grace but as a matter of right; (h) that any veto power they now possess came to them because it was fair and reasonable and because it was a recognition of rights normally accorded to equity owners; and (i) that the economic effect of the proposed plan is precisely the same as if there were an acquisition by MoPac of the properties of T&P and an issuance of MoPac stock to the minority shareholders of T&P, a procedure which, if directly pursued, would require Class B approval under D(3)(a).

These opposing points of view as to MoPac's Articles are not easily resolved. But MoPac's Articles do not stand alone. Hovering over them, as we have indicated, is § 5(11). Accordingly, we move on to the Missouri law and the Articles' posture within that law.

3. The Missouri law. We encounter at once the problem of determining what is "applicable State law" here. There are several possibilities:

a. V.A.M.S. ch. 388 is entitled "Railroad Corporations". Section 388.010 says the term "railroad corporation" means "all corporations . . . now owning or operating, or which may hereafter own or operate, any railroad in this state". This definition would include MoPac. Section 388.290, paragraph 1, authorizes the consolidation of two or more railroad companies "in this state" owning railroads "constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad". It provides for

approval "by a majority in interest of all the stock held in each company". Paragraph 3 reiterates the denial of consolidation authority except when "a continuous line of roads is secured, running in the whole or in the main in the same general direction", and prohibits consolidation where "it will deprive the public of the benefit of competition between said roads". Section 388.300 authorizes a railroad company to "aid" another under specified circumstances and refers to assent thereto by "a majority of the stock of such company".

There immediately arise a number of questions as to the applicability of these chapter 388 statutes, or any of them, to the proposed plan. Some of these impress us as of no real substance. One such is the objection that T&M, being already an existing corporation, makes the plan a merger, rather than a consolidation. Another, suggested by Slayton, is that T&M is not a railroad company because it does not now operate a railroad or own one already constructed. We prefer to regard T&M as a tool organized to effect a genuine consolidation and not as something which, merely because of its present existence, renders the statute inapplicable.

More troublesome is the phrase, "in this state", which MoPac concededly describes as "somewhat obscure". This must refer to something, either the state of incorporation or the location of assets, or business activity. But T&P is not a Missouri corporation and has no railroad properties in Missouri. Further, the requirement of § 388.290 that the consolidated line be a continuous one running in the same direction does not find support in the pleadings here. In addition, the predecessors of chapter 388, viz., Laws of 1869, p. 75, and Laws of 1870, p. 89, were statutes of obviously limited purpose. Finally, we entertain difficulty in discerning any applicability here of § 388.300.

Appendix B

MoPac and Mississippi of course contend that chapter 388 and its majority vote provisions are applicable. While MoPac concedes that the history of railroad consolidation law in Missouri "is confused", it stresses that no Missouri railroad consolidation statute has ever required a class vote, although such a vote is required when a railroad corporation seeks to alter its capital structure by amendment of its articles. § 388.220, par. 2(3)(c). It also points out that Missouri railroad corporations have consolidated with foreign railroad corporations under chapter 388. *State ex rel. Wabash Ry.* v. *Roach*, 267 Mo. 300, 184 S.W. 969 (1916), is cited as one example "in which the Missouri Supreme Court took for granted the propriety of the consolidation under Chapter 388". Our reading of that case, however, see p. 972 of 184 S.W., suggests to us that the consolidation was one made pursuant to the special provisions of § 388.300.

MoPac also points out that "the last great consolidation involving a Missouri railroad", namely, that of the Missouri-Kansas-Texas, was effected through a plan precisely the same in structure as the one here proposed, and that it must have been accomplished under chapter 388 because the two-thirds vote otherwise required by chapter 351, hereinafter mentioned, was not present. *Missouri-Kansas-Texas R.R. Consolidation*, 312 I.C.C. 15 (1960). This may well have been the case but the material concerning that consolidation which has been submitted to us does not reveal that it was effected in the face of opposing argument. We do not find the M-K-T example any more persuasive than the contrary suggestion by plaintiff Levin that during the MoPac reorganization the ICC and the district court appear to have assumed that it was chapter 351 which applied to a merger of MoPac and a Louisiana subsidiary. P. 684 of 290 I.C.C. and p. 402 of 129 F.Supp.

We conclude that, despite chapter 388's broad titular application to railroad corporations, it is in fact confined to special situations of a kind different from the proposed plan here. It is, therefore, not "applicable State law", within the scope of § 5(11), so that its majority vote standard would control.

b. V.A.M.S. ch. 351, is entitled "General and Business Corporations". Section 351.690(3) provides that "Only those provisions of this law which supplement the existing laws applicable to railroad corporations . . . and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of such existing laws, shall be applicable to" railroad corporations. If we are correct in our above analysis that chapter 388 is addressed to fact situations different from that of the proposed plan, and if we may assume, as we think we can, that the proposed plan is not one specifically prohibited by chapter 388, see, for example, § 388.290(3), then § 351.690(3) would seem to indicate that chapter 351 does have application here.

Section 351.458 authorizes merger and consolidation with a foreign corporation. Section 351.420 provides that a plan of consolidation shall be submitted to a vote of the shareholders. Section 351.425 provides that the plan "shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations".[5] We note in these cited sections of chapter 351 the absence of any reference to class voting and thus are tempted to conclude that, were these sections alone to be considered, class voting would not be required for a con-

[5] The district court, when approving the fourth MoPac reorganization plan, held that this shareholder approval was not required *before* submission of the plan to the ICC. *In re Missouri Pac. R.R., supra,* p. 402 of 129 F. Supp.

solidation and that the only necessary vote would be that of two-thirds of all the outstanding voting shares. *Moss Estate, Inc.* v. *Metal & Thermit Corp.*, 73 N. J. Super. 56, 179 A. 2d 54, 62 (Ch. 1962).

But chapter 351 also contains § 351.270, with its provocative provisions.[6] The ultimate issue, then, is whether this section operates to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement. The district court decided this issue in the affirmative, with an unembellished reference to § 351.270, p. 750 of 233 F. Supp.

Mississippi argues that because MoPac's Articles do not provide for class voting on any consolidation, the section cannot apply. It and MoPac also argue that § 351.270's words, "required by this chapter", are important; that they contemplate only the possibility of greater preponderance in voting; that, for example, they permit a requirement of more than the two-thirds vote otherwise specified by § 351.425; that, however, they cannot serve to engraft class voting on a situation where it does not otherwise exist; that, if they did permit this, the Articles would supersede the consolidation statute; that, as a principle, the applicable Missouri statutes are written into every Missouri corporate charter, including MoPac's, citing *Shapiro* v. *Tropicana Lanes, Inc.*, 371 S. W. 2d 237, 241 (Mo. Sup. 1963); *Federal United Corp.* v. *Havender*, 24 Del. Ch. 318, 11 A. 2d 331, 338 (Sup. Ct. 1940), and other cases; and that, with respect to similar statutes in other states, no one has suggested the engraftment of

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[6] § 351.270. "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

class voting upon legislation which merely authorizes articles to provide for greater percentages.

The plaintiffs, singly or together, argue that §351.425's silence on class voting is not negation; that § 351.055(3) authorizes classes of shares; that, therefore, class voting as well as percentages may be superimposed upon the voting percentages required by § 351.425; that the appellants' arguments would render meaningless the reference in § 351.270 to a "series" of shares because chapter 351 nowhere else speaks of a series; that a commentator upon the parallel Illinois statute has reached a conclusion opposite to that espoused by the appellants, Haller, Corporate Control Under the Illinois Business Corporation Act Through Charter and By-Law Provisions, 32 Chi. Bar Rec. 411, 413 (1951); and that it would be bizarre, indeed, to say that § 352.270 permits articles to call for a very high percentage, even all, of the voting shares but at the same time denies class voting.

Here, again, we perceive no clearcut, free-from-doubt and positive answer in these chapter 351 sections to the issue of class voting under Missouri Law. We do conclude that the proposed plan is one governed by chapter 351. But we are not prompted to conclude, with any assurance, that the general two-thirds-of-voting-shares standard embraced by § 351.425 is qualified by § 351.270 to the extent that it demands class voting if the articles seem to require it.

c. If, however, it be assumed that § 351.425 and § 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and if it be further granted that Mo-Pac's Articles call for a class vote on consolidation, two additional questions arise: Are the Articles then "State law", within the meaning of § 5(11)? If so, is class voting then "required" or merely permitted under that state law?

MoPac argues that whatever may be the legal status of the Articles as between MoPac and the State of Missouri,

or as among its shareholders, the Articles are not organic law of the state; that the Supreme Court of Missouri has typified a business corporation as a product of private contract and the articles as a contract between the shareholders, *Shapiro* v. *Tropicana Lanes, Inc.*, supra, p. 241 of 371 S. W. 2d; that this certainly is not "applicable State law"; and, lastly, that there is an overriding public interest in the MoPac situation. Mississippi buttresses this by arguing that "State law" means statutory law and not common law or the law of contracts. There is authority which supports this approach. *Gilliam* v. *California Employment Stabilization Comm'n*, 130 Cal. App. 2d 102, 278 P. 2d 528, 536 (1955); *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 1 N. E. 663, 665 (1885); *Board of Educ.* v. *Town of Greenburgh*, 277 N. Y. 193, 13 N. E. 2d 768, 770 (1933); *Delta County* v. *City of Gladstone*, 305 Mich. 50, 8 N. W. 2d 908, 909 (1943); *State ex rel. McKittrick* v. *Missouri Pub. Serv. Comm'n*, 352 Mo. 29, 175 S. W. 2d 857, 861 (1943); see *Travelers Health Ass'n* v. *FTC*, 298 F. 2d 820, 822 (8 Cir. 1962).

The appellees' response is simply that § 351.270 authorizes charter provisions to impose class voting, that the MoPac charter provides for it, and that a class vote is therefore required under applicable state law. This reasoning may find some support in *Sellers* v. *Joseph Bancroft & Sons*, 23 Del. Ch. 13, 2 A. 2d 108 (Ch. 1938).

Even without placing reliance on *Sellers*, we might favor not restricting § 5(11)'s reference to "applicable State law" to statutory material. The appellants' cited cases, which announce the general rule that a statutory reference to "law" does not include the common law, recognize that a different result follows when context so requires. *Greenburgh*, supra, p. 770 of 13 N. E. 2d; *Gilliam, supra*, pp. 536-37 of 278 P. 2d. We think of no persuasive reason for regarding § 5(11) as distinguishing between a statutory provision for a class vote and a charter

provision for it pursuant to statutory authority. Also, the statute speaks of a vote *under*, rather than *by*, state law; "under" does not connote quite so strongly the specification of a statute but, rather, rights and duties measured by law generally. And there is some indication in the ICC regulations for adherence to charter provisions in consolidation proceedings. 49 C.F.R. 352.3 (1940).

Be that as it may, we are driven to the word "required" in § 5(11). "Required" implies something mandatory, not something permitted by agreement. The difference in concept has been judicially recognized. *In re Boyd*, 213 Fed. 774, 775-76 (2 Cir. 1914); *Huey* v. *Waldrop*, 141 Ala. 318, 37 So. 380 (1904).

We conclude that the MoPac Articles and the Missouri railroad and business corporation statutes do not provide material which carries us far enough. In summary, and in repetition: We hold that the proposed plan is one for a "corporate consolidation" and that the parenthetical material of § 5(11) is applicable. We conclude that a majority of all voting shares in the aggregate is the general standard and that the statute bows in the direction of state law only with its phrase beginning with "unless". We also conclude that chapter 351 has application to the proposed plan. But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something "required under applicable State law". In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them. We are impressed with the significance of the na-

tional transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5(11), and with its consequent preemptive nature. All this compels us, when we entertain doubt for the contrary result, as we do here, to resolve that doubt on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions.

We take comfort in the fact that, if we err in our conclusions, the Class B shareholders still possess that protection, inherent in § 5(2)(b), which is always available to those affected by Commission action on a consolidation plan, namely, that the plan be consistent with the public interest and just and reasonable, and that it is subject to the usual court review. Our present decision, although adverse to the Class B shareholders, does not deprive them of anything which may properly be presented before the Commission and on such review.

Perhaps we should add a final word about two lines of argument which appear in the respective briefs:

1. Each side asserts that in the past the other has adopted a position not consistent with that now espoused. Collateral estoppel, equitable estoppel, and res judicata are all suggested. We are satisfied that any inconsistency, to the extent it is present at all, is not of such dignity or surrounded with such circumstances as support either estoppel or res judicata. One or more of the accepted essentials for these legal results is absent in each instance.

2. The appellees assert that, in any event, the district court's conclusion was a permissible one upon a doubtful question of state law. The question here, however, is a matter which primarily concerns the interpretation of § 5(11). This is a federal statute. Despite its interplay

with the Missouri law, our difference with the district court relates to this statute and the national transportation policy. As a consequence, our perhaps too frequent pronouncements about our unwillingness to override a permissible conclusion reached by an experienced trial judge as to a doubtful question of the law of his state, see *Homolla* v. *Gluck*, 248 F. 2d 731, 733-34 (8 Cir. 1957), has no persuasive application here.

The order of the district court is reversed and the case remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

Statutes and Charter

Interstate Commerce Act—pertinent provisions.

49 U. S. C. § 5(2):

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or * * *

49 U. S. C. § 5(11):

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall as-

sent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Rules of Interstate Commerce Commission—pertinent provisions.

49 C.F.R. § 52.3:

§ 52.3 Required exhibits.

(a) There shall be filed with the original application and as a part thereof, but not with copies, the following exhibits:

Appendix C

(1) As Exhibit A, one or more of the following documents as may be appropriate:

(i) One copy each of the charter or articles of incorporation, and the bylaws and amendments thereof, of each applicant corporation or carrier corporation involved in the proposed transaction duly certified by the appropriate public officer. • • •

(b) There shall be filed with the original application, and with each copy, as a part thereof, the following exhibits:

(1) As Exhibit 1, a copy of all resolutions of directors of each applicant and of each carrier which is a party to the transaction, authenticated by a proper executive officer, authorizing the proposed transaction and, where applicable, the making of the application to the Commission for its approval and authorization; and, if the charter or bylaws of the applicant or carrier require approval of the stockholders, a copy of the resolutions of stockholders authorizing the proposed transaction and the making of the application; all such resolutions to be accompanied by sufficient transcripts of the minutes of meetings of the stockholders or directors of the applicant or carrier to show the number of shares entitled to vote, the number of shares voted for and against the resolutions, and the number of share-votes required to adopt the resolution. • • •

Missouri Revised Statutes (1959)—pertinent provisions.

351.055. Articles of incorporation, contents—

The articles of incorporation shall set forth: • • •

(3) The aggregate number of shares which the corporation shall have the authority to issue, and the number of shares of each class, if any, that are to have a par value

and the par value of each share of each such class, and the number of shares of each class, if any, that are to be without par value and also a statement of the preferences, qualifications, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class; * * *

(9) Any other provisions, not inconsistent with law, which the incorporators may choose to insert.

351.270. Vote of concurrence of shareholders shall be controlled by articles of incorporation, when—

Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section.

351.425. Voting by shareholders on plan for merger or consolidation—At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations.

351.690. Applicability of this chapter to existing corporations—The provisions of this chapter shall be applicable to existing corporations as follows: * * *

(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and

which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

* * *

Charter of Missouri Pacific Railroad Company—Article VII D, paragraph (3).

The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

(The complete text of Article VII D is printed at R. 11-15.)